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## FRENCH COUNCIL OF STATE

### LITIGATION SECTION

#### VOLUNTARY SUBMISSION IN INTERVENTION

- FOR:**
- 1) Internet Freedom Foundation
  - 2) Software Freedom Law Center, India
  - 3) Collaboration on International ICT Policy for East and Southern Africa ("CIPESA")
  - 4) Digital Rights Foundation
  - 5) Unwanted Witness
  - 6) Paradigm Initiative
  - 7) Association for Progressive Communications
  - 8) I-Freedom Uganda Network
  - 9) Jonction
  - 10) Media Rights Agenda
  - 11) Sierra Sustainable Technology
  - 12) The Institutio Beta for Internet and Democracy
  - 13) The League of cyberactivists for democracy, Africivistes

- 14) The Karisma Foundation
- 15) Global Voices
- 16) The Institute of Technology and Society of Rio
- 17) Red en Defensa de los Derechos Digitales
- 18) The Center for Information Technology and Development (“CITAD”), Nigeria

**AGAINST:** The decision no. 2016-054 of 10<sup>th</sup> March 2016 of la Commission nationale informatique et libertés (“CNIL”) imposing a monetary penalty of € 100 000 on Google

**IN SUPPORT OF THE PETITION SUBMITTED BY:** Google Inc. (“Google”)  
(SPC Spinosi & Sureau)

**In support of Motion no. 399.922**

1. This voluntary intervention is filed, through separate submission, pursuant to the provisions of Article R. 632-1 of the Code of Administrative Justice.

It aims at supporting Google's application for the annulment of decision no. 2016-054 of 10<sup>th</sup> March 2016 whereby the *Commission nationale informatique et libertés* (hereinafter referred to as the CNIL) ruled that the delisting process implemented by Google in order to comply with the principles arising from the European Court of Justice's ruling in *Google Spain SL et Google Inc. c. AEPD and Mario Costeja González* on 13<sup>th</sup> May 2014 was insufficient, imposed a monetary penalty on Google and decided to make its decision public.

The admissibility of this intervention as well as the grounds on which the international non-governmental organisations set out above rely to support the findings of the motion will be examined successively.

## 2. Regarding the admissibility of the intervention

The internet has reduced barriers to communication. It is a great enabler of the fundamental right to freedom of speech and expression. It needs to be protected for everyone. The interveners aim to strengthen free expression online and to oppose any unnecessary censorship by government and non-state actors on the internet. Their goal is to help make the internet safer and more accessible.

The interveners are nine international non-governmental organisations who specialise in the defence of human rights, in the protection of freedom of expression on the internet, and in increasing access to information technology around the world. Their particular focus is on human rights protection and freedom of expression in developing countries. By way of example:

- a) The Internet Freedom Foundation defends online freedom, privacy and innovation in India. Through public campaigns, it aims to build and deploy technology to promote freedom on the internet. It advocates a free and open internet and campaigns against censorship in all its forms. It has also sought to intervene in similar litigation in India on delisting and erasure, taking the unequivocal position that there is no “*right to be forgotten*” in India, and that direction for delisting would constitute an impermissible restriction on freedom of expression and the public’s right to information, protected by the Constitution of India;
- b) The Software Freedom Law Centre (“SFLC.in”) is a New Delhi based not-for-profit organization that provides pro bono legal representation and other law-related services to developers of open source software to further the goal of defending digital civil liberties. SFLC.in has worked extensively on issues of free speech, expression online, and intermediary liability, and has a history of supporting courts on these issues, for example they filed a brief with the United States Supreme Court, which was considering whether to grant certiorari in the case of *Google Inc. v Oracle Inc* (US Supreme Court ref. 14-410). SFLC.in has an interest in this matter because the decision of this Court will have a significant effect on the rights of the internet users that SFLC.in

represents. More specifically, SFLC.in has an interest in ensuring that limits are maintained on the reach of law so that free speech rights that are facilitated by the internet are not unreasonably and unnecessarily impeded;

- c) Since its inception in 2004, the Collaboration on International ICT Policy for East and Southern Africa (“CIPESA”) has positioned itself as the leading centre for research and analysis of information aimed to enable policy makers in east and southern Africa understand international Information and Communications Technology (“ICT”) policy issues. Its overall goals are to develop the capacity of African stakeholders to contribute effectively to international decision-making on ICT and ICT-related products and services; and to build multi-stakeholder policy-making capacity in African countries. In particular, CIPESA focuses on decision-making that facilitates the use of ICT in support of development, civic participation and democratic governance;
- d) Digital Rights Foundation is a registered research-based advocacy non-governmental organization focusing on ICT to support human rights, democratic processes and digital governance. Based in Pakistan, the Digital Rights Foundation envisions a place where all people, and especially women, are able to exercise their right of expression without being threatened. It believes that a free internet with access to information and clear privacy policies can encourage such a healthy and productive environment that would eventually help not only women, but the world at large;
- e) Unwanted Witness is a non-governmental organisation based in Uganda. It advises government on internet governance and lobbies for a legal framework that guarantees internet freedom and internet safety. Its work includes the drafting of policy briefs, making shadow reports to relevant human rights bodies to which Uganda is signatory, interfacing between internet actors and government agencies on internet freedom, and also providing legal support to internet users whose work is being threatened. It brings strategic litigation to challenge government actions that threaten the enjoyment of online freedoms in Africa;

- f) Paradigm Initiative is a registered non-for profit organization with core objectives of digital inclusion and digital rights in Nigeria and other African countries of interest. The digital rights mandate of the organization involves working with several stakeholders within the African region on rights-respecting technologies and also pushing for people-inclusive policies in ICT. Paradigm Initiative carries out its work mainly through research reports, stakeholder-dialogues on Internet freedom and policy engagements within the region. Paradigm Initiative is currently working on the Digital Rights and Freedom Bill (HB. 490) becoming a law in Nigeria. It is the first long-term policy document to ensure Internet freedom in Africa and second in the world after Brazil's "*Marco Civil*." The bill has reached an advanced stage of becoming law in Nigeria;
- g) The Association for Progressive Communications has 50 member organisations in 36 countries, the majority from developing countries. The vision of its membership is that: "*All people have easy and affordable access to a free and open internet to improve their lives and create a more just world.*" It works to empower and support organisations, social movements and individuals in and through the use of ICTs to build strategic communities and initiatives for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability. The Association for Progressive Communications is a participant in high level international ICT policy discussions and was granted category one consultative status to the United Nations Economic and Social Council in 1995. Its chief operating office is located in Johannesburg, South Africa.
- h) I-Freedom Uganda Network is an organisation that promotes and supports freedom of speech, expression, association, and assembly through technical IT support, research and development of tools and applications that enhance digital security and safety. It is composed of 28 member organizations which can be broadly categorized into three categories; LGBTI organisations, sex workers organisations and mainstream human rights organisations. The network was formed by a number of organisations that came together at the end of January 2012

to fight against the way in which various key stake holders were misusing the Internet to affect the online and offline freedom and rights of a marginalised groups. These organisations believed that online activity is key to their ability to freely associate, assemble and express themselves freely without any fear of risk and reprisal from state agencies and other dangerous hacking groups. The Network is therefore particularly interested in freedom of expression and associated assembly rights, as they manifest in online expression. It is based in Kampala, Uganda.

- i) Jonction is a non-governmental organization, based in Dakar in Senegal, which aims to promote and defend human rights. Founded in 2006, Jonction has conducted a number of advocacy and awareness campaigns on the protection of personal data, privacy and freedom of expression in both Senegal and West Africa. It has a particular focus on the right to privacy and freedom of expression on the Internet.
- j) Media Rights Agenda is a non-profit, non-governmental organization based in Lagos, Nigeria. It was established in 1997 to promote and defend freedom of expression, including media freedom and access to information. Media Rights Agenda is registered in Nigeria and has Observer Status with the African Commission on Human and People's Rights.
- k) Sierra Sustainable Technology is a non-profit and non-governmental organisation that was established in 2007 due to a large number of school children dropping out of education and large-scale unemployment of young people (especially girls). Its purpose is to serve as a rights-based organisation that meet the needs of poor and deprived communicates through advocacy and the use of sustainable and communications technology, promoting and protecting the rights and responsibilities of women, youth and children through training, awareness raising and empowerment initiatives.
- l) The Instituto Beta: Internet & Democracy is a Brazilian based non-profit organisation engaged in defending and promoting human rights in the digital environment. Beta's activities involve the promotion of Internet

users rights, the production of Internet culture research and reports, and the organisation of social, cultural and political events and demonstrations aimed at preserving democratic values in cyberspace. Its action focuses on the protection of principles such as of freedom of thought and expression, freedom in Internet access, net neutrality and data protection. Pursuant to these goals, Beta has been accepted to intervene as an *amicus curae* in two central Brazilian Supreme Court legal cases relating to WhatsApp blocking.

- m) The League of cyberactivists for democracy, Africivistes, is an association founded in November 2015 and based in Senegal. It has 150 active members in 35 countries in Africa and in the Diaspora. It brings together committed Africans to contribute to addressing challenges of democratisation and freedom on the African continent through participatory democracy, e-democracy and the effective anchoring of democratic culture in our respective countries. Africivistes has supported legal petitions to several governments regarding access to the Internet, net neutrality, privacy and online security. In addition to campaigns, Africivistes also provides online security training to members, media organisations, and civil society.
- n) The Karisma Foundation was founded in 2003 and is based in Bogotá, Colombia. Its goal is to respond to the opportunities and threats that arise in the context of "*technology for development*" so as to ensure the exercise of human rights and the promotion of freedom of expression. Karisma works through activism with multiple perspectives - legal and technological - in coalitions with local, regional and international partners.
- o) Global Voices was founded at the Berkman Center for Internet and Society at Harvard Law School in December 2004. It subsequently became incorporated in the Netherlands as Stichting Global Voices, a nonprofit foundation. Global Voices is a largely volunteer community of more than 1400 writers, analysts, online media experts, and translators. It aims to curate, verify and translate trending news and stories on the Internet, from blogs, independent press and social media in 167 countries.

- p) The Institute of Technology and Society of Rio is a non-profit independent organisation, which is made up of professors and researchers from different academic institutions (such as the Rio de Janeiro State University, Pontifical Catholic University (PUC-Rio), Fundação Getulio Vargas, IBMEC, ESPM, MIT Media Lab, and others). Its mission, over the past 14 years, has been to ensure that Brazil and the Global South respond creatively and appropriately to the opportunities provided by technology in the digital age, and that the potential benefits are broadly shared across society. It is also a member of the Executive Committee of the Global Network of Internet & Society research centers. Its members have been directly involved in the conception and in the collaborative process of creating the so-called “*Brazilian Internet Bill of Rights*” (Law no 12965/14).
- q) Red en Defensa de los Derechos Digitales is a non-profit organization in Mexico that defends human rights in the digital environment. It was formed in 2014. It uses research, advocacy and litigation to defend digital rights in Mexico, including the right to freedom of expression, the right to privacy, and the right of access to knowledge. As part of its work, it has successfully defended online media organizations from Mexico’s data protection decisions ordering the delisting of links to news articles in search engines. This litigation has included the leading case against Mexico's data protection authority, which first considered the implementation of the “*right to be forgotten*” in Mexico. This case arose in the context of an order to delist news articles that considered corruption in Mexico. Red en Defensa de los Derechos Digitales represented one of the news organizations that published the original news story.
- r) The Center for Information Technology and Development (“CITAD”), Nigeria, is a non-governmental and non-profit organization, established in 1996, that is committed to the use of ICT for the development and promotion of good governance, social justice, peace and sustainable development. It commits to universal access to free, secure, affordable and transparent internet services as a platform for development and cultural expression. CITAD uses ICT to empower youth and women in



particular through access to information, skills and online mentoring opportunities. It utilises platforms such as social networking, web-to-text interface and tools such as Google alert to provide information that would promote peaceful co-existence. Its mission is to use ICT to empower citizens for a just and knowledge-based society, anchored in sustainable and balanced development.

The interveners (and those whose rights they seek to defend) rely on freedom of expression and on the free exchange of ideas and information online so as to carry out their important work in protecting human rights around the world. They require unencumbered access to information and they depend upon all rights and freedoms necessary to research, gather, exchange, and receive news and information.

As a result, the interveners are both well acquainted with and uniquely well-placed to address the wider issues raised by this appeal.

The protections, rights, and freedoms on which the interveners rely are challenged by the 10<sup>th</sup> March 2016 order of the CNIL. The CNIL's decision provides that the delisting of public information available on the internet must be effective, "*even if it conflicts with foreign rights*". The CNIL's decision therefore not only amounts to an attempt to impose a limit on these protections, rights, and freedoms, but also represents an attempt to police freedom of expression outside France and around the world.

The interveners now appeal to the French Council of State in light of the penalty imposed on Google by the CNIL's decision of 10<sup>th</sup> March 2016. The CNIL's attempt to implement the right to delisting across the world is disproportionate and in breach of the presumption against extraterritorially. It risks causing a significant interference with the protections for free expression and the right to receive information around the world.

The intervention is therefore admissible and will be admitted.

### **3. Regarding the legality of the CNIL's decision of 10<sup>th</sup> March 2016**

This appeal raises the issue of whether the decision of CNIL disproportionately restricts freedom of expression and the right to information of people around the world. The order of the CNIL requires Google to remove information that would otherwise be made available to individuals accessing information on the Internet. The impact of the CNIL's order is not limited to France, but has a global impact on freedom of expression and on the right to receive information. The order therefore has serious implications beyond the rights of Google and sets a dangerous precedent around the world.

The CNIL failed to give adequate weight to international human rights law and policy and failed to adequately consider the international impact of its decision. The interveners will address these points in turn.

**i. The importance of freedom of expression**

Freedom of expression is an “*indispensable condition for the full development of the person*”. It is “*essential for any society*”. It constitutes “*the foundation stone for every free and democratic society.*” It is a “*necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.*” It is therefore at the centre of all major international human rights conventions.<sup>1</sup>

The right to freedom of expression includes the right to seek and receive information. This not only flows from the express wording of Article 10 of the European Convention on Human Rights, but it also reflects the central principles of free expression. Access to information is a necessary condition of, and a prerequisite for, freedom of expression. The starting point in this appeal should be a consideration of the policy justification for free access to information:

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<sup>1</sup> Article 10 of the European Convention on Human Rights; Article 19 of the Universal Declaration of Human Rights; Article 9 of the African Charter on Human Rights and Peoples' Rights; Article 13 of the American Convention on Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 11 of the EU Charter of fundamental rights;

- a) Firstly, as the case law of the European Court of Human Rights has frequently stressed,<sup>2</sup> freedom of expression and access to information are among of the basic conditions for each individual's "self-fulfilment". Access to information can challenge, offend, shock, and disturb. It thereby fosters pluralism, tolerance, and broadmindedness, without which there is no "democratic society". In addition, access to information encourages self-improvement and is fundamental to education. In the developing world, this aspect of freedom of expression is of particular importance.
- b) Secondly, as the US Supreme Court held in *Abrams v US* 250 US 616, at 630, freedom of expression is integral to the discovery of the truth: "*the ultimate good desired is better reached by free trade in ideas -- ... the best test of truth is the power of the thought to get itself accepted in the competition of the market ... truth is the only ground upon which their wishes safely can be carried out*". This "free trade in ideas" carries with it an obligation to ensure access to information.
- c) Thirdly, freedom of expression is essential to informed participation in a democracy. The central role of freedom of expression in civil republicanism was enunciated by Justice Louis Brandeis of the US Supreme Court in *Whitney v California* 274 US 357, at 375, when he stated that "*the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary.*" Information allows the development of those "faculties" that allow citizens to reason and deliberate, and govern themselves through reason and deliberation, because this is what distinguishes true democracy from the tyranny of the majority, As the recital to the *Aarhus Convention* on access to information, public participation in decision-making, and access to justice in environmental matters recognises, "*improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its*

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<sup>2</sup> See, for example, *Hertel v Switzerland* (1999) 28 E.H.R.R. 534 at paragraph 46, *Steel v United Kingdom* (2005) 41 E.H.R.R. 22 at paragraph 87, *Stoll v Switzerland* (2008) 47 EHRR 59 at paragraph 101.

*concerns and enable public authorities to take due account of such concerns.”* In the case of *Gauthier v. Canada* (Communication No. 633/1995, 5 May 1999), the Human Rights Committee stated that, in order to ensure the full enjoyment of the right to take part in the conduct of public affairs, “*the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential ... this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members*” (at paragraph 13.4). The free exchange of ideas strengthens democratic engagement and transparent government. Freedom of expression enhances transparency, lessens suspicion of Government and promotes public trust. In the developing world, particularly in former colonies, these are not abstract ideas. Free speech protections have been built into constitutional documents because speech (even when it was silenced) was a tool for securing independence, and was a hard fought freedom in a new era of self-government.

**ii. The particular importance of freedom of expression on the Internet**

Each of the above policy principles supports not only freedom of expression in general, but also freedom of expression online. Of vital importance to the interveners is the role of the Internet in the developing world in particular. The interveners emphasise two overlapping and interlinking points in this regard: the Internet’s benefits (a) in enabling access to information, debate and knowledge which is not readily accessible in these regions through traditional media; and (b) in the improvement of the lives of individuals in the developing states in which the interveners work, cannot be underestimated.

a) First, access to the Internet and information online provides many in the developing world with access to debate and knowledge that may not be accessible through traditional media, and thus to a plurality of news and information, in part because it often enables access to information despite financial, political or domestic legal constraints upon local media organisations and journalists. These cross-jurisdictional benefits are of particular importance to the interveners. These cross-jurisdictional benefits

arise also between jurisdictions in the developing world, where there are varying levels of press freedom and financial, legal, and political constraints.

- b) Second, and related to the first benefit, the Internet is an important tool facilitating the right to education and other economic, social, and cultural rights,<sup>3</sup> as it provides access to a vast and expanding source of knowledge, supplements or transforms traditional forms of schooling, and makes, through “*open access*” initiatives, previously unaffordable scholarly research available to people in developing States. Additionally, the educational benefits attained from Internet usage directly contribute to the human capital of States. The Internet has become critical for economic development and the enjoyment of a range of human rights. “*Digital divides*” leave marginalized groups and developing States trapped in a disadvantaged situation. The Internet offers a key means by which such groups can obtain information, assert their rights, and participate in public debates concerning social, economic and political changes to improve their situation.<sup>4</sup>

It is no doubt for these reasons that governments and international organisations have focused on seeking to address the “*digital divide*”.<sup>5</sup> The goal of each of the interveners reflects this – the protection of human rights depends, in part, upon free access to information online. The “*digital divide*” is not only related to the availability of Internet access, but also to the quality, information, and technical knowledge necessary in order for access to the Internet to be useful and beneficial for users.<sup>6</sup>

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<sup>3</sup> United Nations Human Rights Council, Resolution 32/13, “*The promotion, protection and enjoyment of human rights on the Internet*” (July 2016) (A/HRC/RES/32/13).

<sup>4</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16<sup>th</sup> May 2011 (A/HRC/17/27).

<sup>5</sup> See, for example, Target 8f of the Millennium Development Goals, which calls upon states to, “*make available the benefits of new technologies, especially information and communications*”; the United Nations Development Programme-supported “*One Laptop per Child*” project. See, more generally, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011, at paragraph 64.

<sup>6</sup> United Nations. General Assembly. *Information and communications technologies for development*. A/RES/66/184. February 6, 2012.

The United Nations Human Rights Committee has therefore been clear, in its “General Comment No. 34”, that: “States parties should take account of the extent to which developments in information and communication technologies, such as Internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto” (at paragraph 15).

To equal effect, the European Court of Human Rights has stressed that: “user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression”.<sup>7</sup> It has also emphasized that, “In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of Internet archives is a critical aspect of this role...”.<sup>8</sup>

Here in France, the Conseil d'Etat has described access to the Internet as a fundamental right.<sup>9</sup>

### iii. The strict proportionality test

International human rights law establishes that any infringement with freedom of expression will only be lawful where the following tests are satisfied:<sup>10</sup> (a) the limitation is in accordance with law, (b) the limitation protects a legitimate interest, namely in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority

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<sup>7</sup> *Delfi AS v Estonia* (2016) 62 EHRR 6, at paragraph 110.

<sup>8</sup> *Times Newspapers Ltd (nos.1 and 2) v the United Kingdom* (App. nos. 3002/03 and 23676/03), at paragraph 27.

<sup>9</sup> Conseil d'État, Etude annuelle 2014, *Le numérique et les droits fondamentaux*, September 2014, p. 90.

<sup>10</sup> Article 19(3) International Covenant of Civil and Political Rights, Article 10(2) European Convention on Human Rights, Article 13(2) American Convention on Human Rights.

and impartiality of the judiciary, and (c) the limitation is necessary and proportionate in a democratic society.

Given the fundamental importance of the Internet in the provision of information, especially in the developing world, any measure that seeks to interfere with the free exchange of information on the Internet must be subject to a particularly strict proportionality test.

This is reflected in international human rights guidance. By way of example:

- a) When assessing the proportionality of a restriction to freedom of expression on the Internet, the impact that the restriction could have on the Internet's capacity to guarantee and promote freedom of expression must be weighed against the benefits that the restriction would have in protecting other interests;<sup>11</sup>
- b) It is "*crucial*" for restrictions to access to information on the Internet to be "*oriented toward achieving urgent objectives*" that are authorised. The limitation must be necessary in a democratic society for "*achieving the urgent goal it seeks*" and "*strictly proportional*" to the end sought.<sup>12</sup>
- c) Placing restrictions on a person's exercise of the right to disseminate information over the Internet requires "*proving the existence of real and objectively verifiable causes that present at the very least a sure and credible threat of a potentially serious disturbance of the basic conditions for the operation of democratic institutions*";<sup>13</sup>
- d) When evaluating the necessity and proportionality of any restrictive measure, "*a systemic digital perspective must be applied that takes into*

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<sup>11</sup> Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. *Joint Declaration on Freedom of Expression and the Internet*, Point 1 b).

<sup>12</sup> Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, 31<sup>st</sup> December 2013, (CIDH/RELE/INF. 11/13), at paragraphs 59 and 61.

<sup>13</sup> [ibid], at paragraph 62.

*account the impact the measure would have on the operation of the Internet as a decentralized and open network”;*<sup>14</sup>

- e) In order to prevent the existence of indirect barriers that disproportionately discourage or directly limit the right to freedom of expression on the Internet, *“jurisdiction over cases connected to Internet expression should correspond exclusively to States to which the cases are most closely associated, normally because the perpetrator resides there, the expression was published from there, or the expression is aimed directly at a public located in the State in question”.*<sup>15</sup> As the Council of Europe has put it: *“measures adopted by State authorities in order to combat illegal content or activities on the Internet should not result in an unnecessary and disproportionate impact beyond that State’s borders”.*<sup>16</sup>

#### **iv. The limitation imposed by the CNIL fails this test**

The decision of the CNIL fails this strict proportionality test. This is for the following reasons:

- a) The order goes far beyond requiring a website to be removed. Rather, it requires Google to alter the contents of search results available worldwide, including in developing states. This is a very significant interference with freedom of expression rights. Google, and other Internet search engines, provide the mechanism by which the vast majority of Internet-users seek, receive, and impart information;
- b) The order, which is expressly unlimited in geographical reach, is therefore overly broad. It goes far beyond what is necessary to protect any individual rights in this case. It has no limiting principle;
- c) The CNIL failed to have due regard to the fact that the order will have the effect of rendering material unsearchable in every country in the

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<sup>14</sup> [ibid], at paragraph 63.

<sup>15</sup> [ibid], at paragraph 66.

<sup>16</sup> Council of Europe, Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet, at paragraph 2.



world. The rights of those seeking information in countries outside of France have not been properly considered. Given the fundamental importance of access to online information, especially for those in developing states, any assessment of proportionality should have placed particular weight on the importance of maintaining full and free information on the Internet.

**v. Comity and Reciprocity**

In addition, the order of the CNIL violates the principle of state sovereignty under international law.<sup>17</sup> It has global effect and deprives foreign states of the opportunity, which would usually be open to them through the principles of comity, to consider whether or not the order is consistent with their laws and public policy before it is applied to individuals within their borders. It is striking that the CNIL decision imposes a “*right to be forgotten*” even on countries that do not recognise this principle.

In the developing world, given that some governments are already trying to restrict freedoms on the internet through restrictive local laws, a precedent compelling companies to remove content based on already limiting laws will have the effect of eliminating checks and balances that inhere in international law. Countries such as Pakistan are already making efforts to ensure that certain political and critical content is removed from cyber space and the interveners are concerned that compelling companies to follow restrictive laws and will further stymie the right to access to information and free speech. Such a precedent will also mean that dissent within a country can be censored in equal measure internationally.

As a result, the order of the CNIL sets a dangerous precedent, by opening the door for national authorities in other countries to impose global restrictions on freedom of expression through remedies grounded solely in their own domestic law. The possible race to the bottom is of the utmost concern to the interveners.

For these reasons, the decision should be annulled.

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<sup>17</sup> See, amongst other provisions, Article 2 of the United Nations Charter.

**ON THESE GROUNDS**, and any other to be raised, inferred, or substituted, if needed *sua sponte*, may the Council of State:

- **ADMIT** the present voluntary intervention submitted by Internet Freedom Foundation, Software Freedom Law Center, India, Collaboration on International ICT Policy for East and Southern Africa (“CIPESA”), Digital Rights Foundation, Unwanted Witness, Paradigm Initiative, Association for Progressive Communications, I-Freedom Uganda Network, Jonction, Media Rights Agenda, Sierra Sustainable Technology , The Institutio Beta for Internet and Democracy, The League of cyberactivists for democracy, Africtivistes, The Karisma Foundation, Global Voices, The Institute of Technology and Society of Rio , Red en Defensa de los Derechos Digitales, The Center for Information Technology and Development (“CITAD”), Nigeria.

- **ACKNOWLEDGE** the arguments presented by Google;

with all legal consequences.

**THOMAS HAAS**

**Lawyer before the French Council of State and the French Supreme Court**